# STATE OF MICHIGAN

# COURT OF APPEALS

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LINDA LEKSCHE, personal representative of the estate of Louis Leksche, deceased,

Plaintiff-Appellant,

V

HENRY AND ELAINE PERKOWSKI,

Defendants-Appellees.

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UNPUBLISHED
August 2, 2002

No. 228326
Wayne Circuit Court
LC No. 98-812843-NO

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition for defendants. Plaintiff had filed a wrongful death claim alleging that defendant was negligent in the maintenance and inspection of the smoke detector located in plaintiff's decedent's apartment, and that this negligence was the proximate cause of plaintiff's decedent's death. We affirm.

On April 26, 1995, the back apartment of a residential duplex caught fire, destroying much of the building and resulting in the death of the decedent. Plaintiff, who was decedent's sister, leased the rear apartment of the duplex from defendants but permitted the decedent to reside in the apartment. The fire started in the living room of the apartment, which was the area where the smoke detector for the apartment was located. According to the testimony, the fire was apparently first noticed by a neighbor and his acquaintance. As they drove by the duplex, they noticed that the windows to the apartment were cloudy and that thick black smoke was coming from the roof of the building. These gentlemen called emergency fire services, and then went to the back of the duplex and saw strong burning flames at the rear. They and other witnesses unsuccessfully attempted entry into the apartment. Each testified that they did not hear a smoke alarm while they were close to the apartment.

When the firefighters arrived, they gained entry to the apartment and found the decedent lying on the floor near the rear door. None of the firefighters heard the smoke alarm either before or after they gained entry to the apartment. An inspection of the apartment after the fire revealed that the smoke detector had been destroyed in the fire.

Plaintiff contends that genuine issues of material fact exist that preclude summary disposition. In particular, plaintiff contends that the fact that none of the witnesses or fire personnel at the scene heard the smoke detector alarm raises questions of fact as to whether the

smoke detector was operable at the time of the fire. Plaintiff also relies on the Canton Township Fire Department report as support for her assertion that the smoke detector was not operating at the time of the fire. Defendants dispute plaintiff's contention, pointing to plaintiff's testimony that she checked the smoke detector monthly, including earlier in the month before the fire, that the detector made a loud sound, and that she was aware that when toast burned, the detector made the same sound that it made when she tested the detector. Defendants claim that because of this and the other evidence in the case, plaintiff's argument that the smoke detector was inoperable at the time of the fire is mere conjecture and speculation.

Review of a grant of summary disposition under MCR 2.116(C)(10) is subject to de novo review. A trial court may grant a motion for summary disposition if the affidavits and other documentary evidence demonstrate that there is no genuine issue of material fact, and thus, that the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Furthermore, "where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id.*

In order to withstand a motion for summary disposition when the claim rests on circumstantial evidence, the "circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only…." *Id.* at 164, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422: 79 NW2d 899 (1956). Thus, "a mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Id.* at 165, quoting *Mulholland v DEC Int'l Corp*, 432 Mich 395, 416 n 18; 443 NW2d 340 (1989).

Viewing the evidence in the light most favorable to the plaintiff, we conclude that the circumstantial evidence presented here establishes no more than the mere possibility that the smoke detector did not operate when the fire *initiated.* As such, there is insufficient circumstantial evidence of causation to create a question of fact as to whether defendants negligently maintained and inspected the smoke detector. Because there was no evidence establishing how long the fire had been burning before the witnesses first noticed the smoke, it can only be speculated as to whether the smoke detector had already been destroyed before the witnesses were close enough to the apartment to hear an alarm of the volume described by plaintiff, or whether the smoke detector was never operable during the fire. Either explanation being *plausible*, the evidence does not permit a *reasonable* inference that supports the plaintiff's assertions.

In addition, the Canton Township Fire Department Report states that the smoke detector performance was "not a factor." Contrary to plaintiff's contention, this report rules out the performance of the smoke detector as a cause of the fire and adds nothing to the determination

whether the detector was operating at the time the fire initiated. In short, plaintiff has failed to produce "evidence which affords the reasonable conclusion that it was more likely than not that the conduct of the defendant[s] was *a cause in fact of the result*." *Skinner*, supra at 165, quoting *Mulholland*, supra (Emphasis added). As such, summary disposition in favor of defendants was appropriately granted.

In light of our conclusion that there was insufficient evidence of causation to withstand summary disposition, we find it unnecessary to decide whether the trial court correctly determined that summary disposition in favor of defendants was appropriate because defendants were in compliance with the applicable Canton Township zoning ordinances.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder